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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION
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Arizona Corporation Commission
DOCKETED
FEB 23 2015
DOCKETED BY

IN THE MATTER OF THE PETITION OF ARIZONA WATER COMPANY FOR AN INCREASE OF AREA TO BE SERVED AT CENTRAL HEIGHTS, ARIZONA.

Docket No. W-01445A-14-0305

ARIZONA WATER COMPANY'S REPLY IN SUPPORT OF MOTION TO DISMISS PETITION TO AMEND DECISION 33424 PURSUANT TO A.R.S. § 40-252

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I. THE CITY'S FACTUAL ALLEGATIONS ARE INSUFFICIENT TO STATE A CLAIM FOR THE ONLY RELIEF IT SEEKS IN THE PETITION.

A. The City Has Not Refuted The Legal Standard To Be Applied In Deciding The Motion.

In its Motion to Dismiss, Arizona Water Company set out the legal standard for dismissal of a Petition pursuant to Arizona Rule of Civil Procedure 12(b)(6). The City did not refute, or even address, the governing standard to be applied and has thereby conceded that the standard set forth by Arizona Water Company controls here.

In Arizona, "[b]ecause Arizona courts evaluate a complaint's well-pled facts, mere conclusory statements are insufficient to state a claim upon which relief can be granted. . . . [A] complaint that states only legal conclusions, without any supporting factual allegations, does not satisfy Arizona's notice pleading standard under Rule 8." Cullen v. Auto-Owners

Ins. Co., 218 Ariz. 417, 419, 189 P.3d 344, 346 (2008). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Dube v. Likins, 216 Ariz. 406, 424, 167 P.3d 93, 111 (App. 2007), *quoting* Bell Atl. Corp. v. Twombly, 500 U.S. 544, 555 (2007) (affirming dismissal for failure to state a claim).

Broken down into its component parts, the City's case for A.R.S. §40-252 relief turns on one issue, which the City labels as the "single biggest fact" (Response at p. 1, l. 17) that it contends precludes dismissal: the conclusory assertion that the City was already serving customers in the disputed areas as of the date Arizona Water Company filed and processed its CC&N applications with the Commission in 1961. That is the only allegation that relates to the relief the City seeks, which is based on a "mistake" argument under A.R.S. §40-252. The other allegations discussed in the Response regarding sufficiency of service and ability to provide service in 2015 are completely irrelevant, because the City strongly contends that it is not seeking deletion on that basis. The only relevant allegations in the Petition to the relief the City says it seeks are those relating to the status of the parties in 1961. Accordingly, the arguments that "AWC has failed to mention that it does not have any customers in the disputed area and the City is the only entity with infrastructure in place to serve the disputed area" (Response at p. 1, ll. 17-19), although wrong, are irrelevant because the City has admitted that it is not seeking deletion on either of those grounds. This is not a "we are better able to serve than you" case involving an uncertificated area; the City has cast its relief solely on the basis of events that occurred in 1961, because it knows it cannot meet the standards for deletion of the Company's current CC&N under the James P. Paul case.

When viewed through this lens, as it must be, the City's Petition fails to state a claim and should be dismissed under Rule 12(b)(6).

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B. The City Has Not Alleged Any Specific Facts To Support Its Conclusory Assertions That It Provided Water Service Within The Certificated Area In 1961.

The City argues that its Petition should survive because it has pled that it "was serving customers in the disputed area before AWC was granted a CC&N." Response, at 1, ll. 18-19. The City defines the "disputed area" as those highlighted portions in Exhibit E. Id. at 1 n.1. In its Petition, the City explains that Exhibit E represents a map showing where its current customers are located within Arizona Water Company's CC&N. Petition, at p. 4 and Ex. E. To survive Rule 12(b)(6), however, the City needs to allege specific facts rather than such "labels" or "conclusions." A close look at the Petition demonstrates that the City has set forth no specific factual allegations in support of its summary conclusion that the City itself was serving customers across all of those areas in 1961.

To decide the Motion, the Commission must look to the language that is pled in the Petition. The City alleges only that an independent researcher "is in the process of producing a report that shows Globe was serving water in both areas before 1961." Petition, at p. 4. In a footnote, the City suggests that the researcher "has found information that shows water was being provided in the Southern Area in the 1910s and in the Northern Area the City started a rudimentary wastewater treatment plant in 1917." Petition, at p. 4, n.12. Aside from the fact that the asserted development of a wastewater treatment plant has nothing to do with water service, the City's Petition neglects to plead any of the facts purportedly found by the researcher that could support this conclusory statement.

The City further asserts in its Response that it "provided several instances where it can prove that service was established before the erroneous initial 1961 grant of the CC&N to AWC," (Response at p. 3, ll. 10-11), but again the Petition omits any specific factual allegations that constitute a single instance, let alone "several instances" of service, by the City in the disputed areas prior to 1961. The City argues it its Response (p. 3, n. 10) that the location of the allegations that meet the Rule 12(b)(6) standards concerning service before 1961 are "Petition Page 6 lines 11-18." However, there are no allegations of specific

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instances where the City was serving any portion of Arizona Water Company's certificated area as of 1961 in that section of the Petition. For instance, the allegation that the City had a rudimentary wastewater treatment plant in the Northern Area in or before 1961 does not plead that the City itself was providing public utility water service to customers in that area. The allegation that "the Southern Area was being served back to the 1910s" is in passive voice and is vague—the City has not even stated who was allegedly providing that service. The allegations concerning City Council minutes and the 1957 ADOT map are also ambiguous and conclusory.

It is based on these sparse and conclusory allegations that the City asks the Commission to conclude that, in 1961, the "Commission erroneously assumed that no entity was providing water service in the area." Response, at 3. Again, the City cannot provide any support or show that any foundation exists for its conclusory assertions about what the Commission was assuming more than five decades ago. The Decision specifically recites that the Commission held a hearing, that the Commissioners were present, that the applicant and the opposing party presented testimony, both oral and documentary, and that the Commissioners considered that testimony and the files and records in the matter. The City's allegation that the Commission made any assumption whatsoever is mere conjecture and speculation without specifically pled facts, and cannot survive Rule 12(b)(6).

Contentions in a complaint must be supported by fact allegations. A court, or the Commission, is not permitted to speculate about facts that might establish a claim; rather the court is limited to the factual allegations pled. Cullen v. Auto-Owners, Inc., 218 Ariz. 417, ¶ 14, 189 P.3d 344, 347 (2008). If the City possesses specific information supporting its conclusory assertions, it should have pled those facts. It is not permissible to file a claim against a party based upon unfounded conclusions, with the hope and expectation that some independent researcher will eventually identify some evidence to support those assertions. The City has put the "cart before the horse" in its Petition.

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C. There Are No Factual Allegations To Support The City's Assertion That "No One" Was Aware Of The CC&N Boundaries.

The City also asserts that "no one, including AWC, was exactly sure of the boundaries until AWC filed the first notice of claim." Response, at pp. 6-7. This assertion is another example of an improper conclusory allegation as opposed to specific facts, as required by Rule 12(b)(6). The boundaries of the CC&N are set out clearly in Decision No. 33424. See Petition at Ex. B. The Decision has been a matter of public record since it was filed in 1961. The City had constructive if not actual knowledge of those CC&N boundaries. It appears that the City was aware of the boundaries by no later than 2012 according to its own allegations. See Petition, at p. 3 & Ex. C (Notice of Claim dated Aug. 1, 2012); Response, at p. 7 (disclosing the City was aware of the boundaries by the time it received Arizona Water Company's first notice of claim). There is evidence that the City was aware of the boundaries even before then. See Motion, at p. 12, ll. 10-17 (identifying several instances prior to 2012 where the City acknowledged the boundaries of Arizona Water Company's CC&N).

The City also argues that the Company must not have known the boundaries of its CC&N because, if it did, then it would have known that the City was poaching customers within its boundaries. Response, at p. 7. This assertion is based on a faulty premise: that Arizona Water Company's knowledge of the boundaries of its CC&N equates to knowledge of every intrusion into its CC&N. The City made repeated assertions to Arizona Water Company that it was not providing water service to customers in the subject CC&N area. See Motion, at p. 12, ll. 8-17. Likewise, the fact that Arizona Water Company sold land to Globe for a water tank does not mean that the Company was aware the City intended to use the tank to serve customers within the Company's CC&N, as opposed to customers within the City's own service area (which is only a short distance from that water tank and outside of the Company's CC&N).

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II. THE RELIEF THE PETITION SEEKS IS DELETION OF ARIZONA WATER COMPANY'S CC&N, AND JAMES P. PAUL THEREFORE CONTROLS.

Even if the City's Petition were properly pled, which it is not, there are other reasons why it should be dismissed under Rule 12(b)(6). The first of these additional reasons is that even with all facts taken as true, the substance as opposed to the form of this case is a deletion proceeding that cannot meet the James P. Paul test. The City's reliance on Arizona Corporation Commission v. Arizona Water Co., 111 Ariz. 74, 523 P.2d 505 (1974) is misplaced. The facts of Arizona Water Co. have nothing in common with the City's Petition. In Arizona Water Co., two water companies, Arizona Water Company and R.J. Fernandez d/b/a Holiday Forest Water Company ("Fernandez"), separately applied for certificates of convenience and necessity to deliver water to the same property under development at the time. Id. at 75, 523 P.2d at 506. On August 8, 1969, the Commission granted Arizona Water Company's application and denied Fernandez's. Id. Immediately afterwards, Fernandez applied for a rehearing, which the Commission granted. Id. Only four months after the rehearing, the Commission issued an order to show cause to the Arizona Water Company why it should not have its order granting the certificate to Arizona Water Company vacated. Id. The Commission held the show cause hearing on June 25, 1970 and, on August 4, 1970, the Commission rescinded its decision granting Arizona Water Company the certificate and granted a certificate to Fernandez. Id.

This process took less than a year from the initial grant of the CC&N to Arizona Water Company, and was in line with the proper procedural process for contesting a Commission decision. See A.R.S. § 40-253. Arizona Water Company then followed the same procedure as Fernandez and, after the Commission denied the Company's petition for rehearing, Arizona Water Company appealed to the Superior Court pursuant to A.R.S. § 40-252. Id. The Superior Court ultimately vacated the Commission's decision rescinding Arizona Water Company's CC&N and granting a CC&N to Fernandez, and the Arizona Supreme Court affirmed the Superior Court. Id. at 75, 77, 523 P.2d at 506, 508.

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In Arizona Water Co., both the Superior Court and the Supreme Court were addressing whether the Commission's rescission of its initial grant of the CC&N to Arizona Water Company was reasonable. Neither the courts nor the Commission were addressing whether it was appropriate or permissible to delete part of a CC&N granted over 53 years ago through a Petition to "amend" a Commission decision. Arizona Water Co. does not apply here since this matter is not on immediate rehearing from the original grant of the CC&N under A.R.S. § 40-253. Instead, it is a new, separate action brought more than five decades later under A.R.S. § 40-252.

Arizona Water Co. is also factually different from the present matter. In that case, two water utilities had competing applications over an uncertificated area, for which they both were seeking an initial CC&N. Id. at 75, 523 P.2d at 506. In making its original decision to grant Arizona Water Company the certificate, and in reconsidering that decision on rehearing, the Commission was considering evidence and deciding whether the public interest would be better served by granting the certificate to one utility over the other. Id. at 76-77, 523 P.2d at 507-08. Arizona Water Co. was a "we are better able to serve than you" case. Here, there is no record of competing applications in 1961. Rather, the Commission, after a hearing and considering the evidence presented, made the determination that there was no competing service in the area to be certificated and that the public interest would be served by granting Arizona Water Company the right to serve the area. See Petition, at Ex. B (Decision No. 33424). Unlike Arizona Water Co., the City is challenging an existing, decades-old CC&N as opposed to still litigating the original CC&N grant proceeding as one of the initial competing applicants.

The City is wrong when it asserts in its Response that the "facts of the Arizona Water Co. case, not the Paul Case are exactly the facts of this case..." (Resp. at 2-3). The City is also wrong that in Arizona Water Co. the "Commission made an error in the initial grant to the CC&N to AWC." Response, at 3. The Commission granted the CC&N to Arizona Water Company in the first instance. 111 Ariz. at 75, 523 P.2d at 506. It was the

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Commission's decision to rescind that initial grant that was in error, for the reasons set out by the Supreme Court. Id. at 76-77, 523 P.2d at 507-08. Arizona Water Co. is neither controlling nor relevant to this case.

The City attempts to cast its Petition as a challenge to the initial CC&N grant, in order to avoid the clear and unambiguous standard for deletion set out in James P. Paul. James P. Paul does not allow such a maneuver. In James P. Paul, the argument was made that the deletion of Paul's certificate was justified on the grounds that the initial grant of the certificate "was inappropriate because it was granted before there was 'a public need and necessity for that certificate.'" Id. at 429 n.3, 671 P.2d at 407 n.3. The Supreme Court rejected this similar "mistake" argument as the justification for the deletion of a portion of Paul's CC&N. Id.

In addition, the City has alleged nothing of substance in support of its mistake argument. The City has speculated, but not alleged any facts to support its speculation, that the "Commission erroneously assumed that no entity was providing water service in that area." Response, at 3; see also Motion, at pp. 9-10 (detailing allegations in the Petition). As set forth in Section I above, the City's conclusions that it was actually providing water service within any area of Arizona Water Company's CC&N as of 1961 are unsupported and unsubstantiated by any specific facts. These conclusory allegations are insufficient as a matter of law. See Cullen, 218 Ariz. at 419, 189 P.3d at 346; Aldabbagh, 162 Ariz. at 417, 783 P.2d at 1209.

The City suggests in its Response that it can prove that the City served a portion of the CC&N area prior to and during 1961. If the City possesses such evidence, however, the time to set forth those facts—or even a portion of those facts—was in its Petition. Yet, the City did not offer anything more in its Response then the same unsupported conclusions set forth in the Petition (even citing to the same unsupported conclusions by page and line number). The City's conclusions are insufficient on their face and the Commission should dismiss the City's Petition under Rule 12(b)(6).

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III. NOTICE TO THE CITY OF THE 1961 HEARING OR CC&N APPLICATION, OR THE ABSENCE OF SUCH NOTICE, DO NOT PROVIDE A BASIS TO DELETE ARIZONA WATER COMPANY'S CC&N DECADES LATER.

In its Response, the City contends it was entitled to notice of Arizona Water Company's CC&N application and the hearing concerning it because it was an affected municipality and it was providing water service in the area. Response, at p. 6. However, the City has not identified a single Commission rule that required notice to municipalities in, near, or bordering the area at issue in 1961. Again, the City has failed to set forth any allegations supporting its assertion that it was actually providing water service in the disputed areas. Contrary to the City's arguments, Walker v. DeConcini, 86 Ariz. 143, 341 P.2d 933 (1959), does not establish such rules or practices. Rather, as expressly stated by the Court in Walker, "under the constitution and the laws of the State of Arizona there is no requirement that notice of the application hearing be given to all landowners or potential water customers residing within the area covered by an original application for a certificate of convenience and necessity to operate a domestic water utility." Id. at 148, 341 P.2d at 936. In addition, the City has not presented (because it cannot) any constitutional or statutory provision that required such notice to an affected municipality in 1961. In fact, there was no constitutional or statutory provision requiring notice to the City at that time. The only administrative rule in effect in 1961 concerning notice left "the matter of notice [to] the discretion of the Commission." Id. at 148. Moreover, the Decision specifically states that notice was given as provided by law. Petition, at Ex. B. Thus, if the Commission filed the Decision without requiring additional notice to the City of Arizona Water Company's application, it was within its discretion to do so, and the City cannot seek to amend the 1961 Decision on that basis. Walker, 86 Ariz. at 149, 341 P.2d at 937 ("where the law in a particular phase of Commission jurisdiction does not provide for 'notice', or further, the manner of notice, the Commission may determine the notice or manner of notice in its discretion").

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Finally, despite its representations to the contrary, the Petition does not allege that the City did not have actual notice of the application and hearing. Rather, the City alleges a handwritten list on a copy of the Decision should be assumed to be a service list and, based on that assumption, the Commission should infer the City never received formal notice. See Response, at p. 6; Petition, at p. 2. Such allegations do not constitute a claim by the City that it did not receive notice of the proceedings, even if such notice was necessary at the time, which it was not.

IV. THE CITY'S RESPONSE MAKES CLEAR THAT THE PETITION IS A COLLATERAL ATTACK ON THE 1961 DECISION.

Another reason apart from defective pleading that the Petition cannot survive is that it is an improper collateral attack on a Commission Decision. The City contends otherwise, asserting that the Decision is based upon a mistake and, because of that mistake, the Commission acted without authority. Response, at p. 5. The City cites no statute, case or regulation in support of its argument that the Commission had no authority to issue the CC&N to Arizona Water Company even if the City was providing scant service in the area or if the Commission provided no notice to the City. As already discussed at length, the City has not actually alleged any mistake by the Commission. The Commission expressly found that there was no competing service in the area to be certificated. Petition, at Ex. B. To the extent the City contests that finding (based upon nothing more than speculation), the City is attacking the sufficiency of the Commission's findings, which is a collateral attack. The Commission's issuance of the CC&N to Arizona Water Company was based on the Commission's express factual finding, after hearing evidence, both testimonial and documentary, that the public interest would be served by the certificate. Cf. Ariz. Corp. Comm'n v. Tucson Ins. & Bonding Agency, 3 Ariz. App. 458, 415 P.2d 472 (Ct. App. 1966). "Such determination is conclusive and in the absence of an appeal therefrom is res adjudicata." Id. The Commission has the power pursuant to A.R.S. § 40-282 to issue certificates of convenience and necessity. Thus, there can be no question that the

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Commission acted with jurisdiction in granting the Decision, and the Petition, filed more than five decades later, is an improper collateral attack on the Decision.

V. THE PETITION SHOULD BE BARRED BY LACHES.

Another independent ground for dismissal is laches. Arizona Water Company has identified several reasons why the Petition is barred under the doctrine of laches. See Motion, at pp. 11-12. Specifically, Arizona Water Company, and all of the parties, are prejudiced by the decades of time that have passed since the Commission issued the Decision, and the parties have relied upon and conducted themselves based upon the unquestioned validity of the CC&N for over five decades. Id.

In its Response, the City suggests it was not able to file its Petition sooner because it did not know the exact boundaries of Arizona Water Company's CC&N until it received the first notice of claim. Response, at 6-7. The City, however, did not file its Petition for yet another two years after that date. Moreover, for the reasons set forth in Section I(C), above, the City's allegations concerning who had knowledge of the boundaries as of what dates lack specificity and are conclusory.

The City further argues that Walker undermines Arizona Water Company's laches argument. Walker, as well as the case it quoted, Pacific Greyhound Lines v. Sun Valley Bus Lines, 70 Ariz. 65, 216 P.2d 404 (1950), are factually distinguishable from this case. Prior to the Walker case, in July 1948, the Commission had granted to Albert and Adalia Walker (the "Walkers") a CC&N for the provision of water service covering one and one-quarter sections of land in southern Arizona. 86 Ariz. at 146, 341 P.2d at 935. In 1956, only eight years later, the Walkers filed an application with the Commission to sell and transfer their water utility and certificate to Sunnyside Water Company, Inc. ("Sunnyside"). Id. At the hearing on the Walkers' application, the DeConcinis and the Murphys, individuals owning land within the Walkers' certificated area at the time of the initial grant, appeared and challenged the validity of the certificate. Id. Thereafter, the Walkers and Sunnyside filed a complaint for declaratory judgment seeking to affirm the legality of the

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certificate. Id. The trial court issued a declaratory judgment that the certificate was void as to the DeConcinis' and Murphys' lands, and an appeal to the Supreme Court followed. Id. The Supreme Court ultimately held that the certificate issued to the Walkers was void because the Commission utterly lacked a legal basis to issue it; there the Commission failed to participate in a hearing or consider any evidence, or even have a transcript made of the meeting in which a Commission staffer (not the Commission) recommended issuing the certificate. Id. at 153, 341 P.2d at 940. It was stipulated that the none of the commissioners were present at the hearing on the application in Walker and that there was no court reporter at the hearing and no transcript of the hearing prepared. Id. at 151, 341 P.2d at 938.

The Walker opinion did not hold that laches is generally unavailable in all cases. Rather, the Court explained that "we do not feel the doctrine of laches can be applied *to this case* for the certificate was void from the outset because the Commission did not hear evidence and such a certificate cannot later be validated by any acts of appellees or anyone else on the theory of laches." Id. (emphasis added).

It was simple matter for the Supreme Court to reject the laches argument in Walker because it was dealing with a void certificate. But this is not a case where Arizona Water Company is trying to breathe life into a jurisdictionally void CC&N by arguing laches. Here, unlike in Walker, the Company's CC&N is unquestionably jurisdictionally valid. The Decision itself recites that the Commissioners were present, and that the Commission heard and considered evidence. None of the Walker defects exist here. The City is attempting instead to delete portions of Arizona Water Company's CC&N on completely different grounds. Importantly to the laches analysis, in Walker only eight years had passed since the issuance of the certificate, where here over 53 years have passed. At the time the Supreme Court was considering the questions presented in Walker, the parties, the Commission, and the courts still likely had a complete record upon which to examine the initial hearing on the Walkers' application. Here, none of the pertinent witnesses are available to provide evidence concerning the proceedings 53 years ago and the Commission's record of the

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original proceedings is no longer available. Laches must apply at some point to bar collateral attacks on existing CC&Ns, and 53 years is too long to procedurally allow a competing provider to attack a CC&N decision that was jurisdictionally valid when granted on grounds that an obscure "mistake" might have been made when it was first issued. Allowing such an attack would open a Pandora's Box of uncertainty that threatens the integrity of CC&Ns throughout the State and imperils the investment and planning every utility undertakes in reliance on the validity of certificates.

In support of its explanation as to why it did not find laches available under the circumstances, the Court in Walker quoted the same language as the City from Pacific Greyhound. Pacific Greyhound dealt with competing routes between two bus carriers. See 70 Ariz. at 68, 216 P.2d at 406-07. Plaintiff Pacific Greyhound Lines ("Greyhound") filed an action against Defendant Sun Valley Bus Lines ("Sun Valley") seeking to enjoin Sun Valley's competing service along certain overlapping routes. Id. at 67, 216 P.2d at 406. Importantly, Greyhound was not challenging the validity of Sun Valley's certificates, issued by the Commission, but was rather asserting that Sun Valley's operations were not in accordance with those certificates and that subsequent Emergency Orders and Ex Parte Supplemental Orders were void. Id. at 68, 73-76, 216 P.2d at 406, 410-413. Thus, the Court in Pacific Greyhound was not directly addressing whether a challenge to Sun Valley's certificates might be barred by laches. In addition, in Pacific Greyhound, as in Walker, the Court concluded that the orders at issue were void. Id. at 73-76, 216 P.2d at 410-413. Moreover, in Pacific Greyhound, Greyhound was challenging competitive routes that Sun Valley began to serve in or about 1942 and 1943. Id. Greyhound filed its declaratory action in 1946—only four years after the competition at issue began. Id. at 67, 216 P.2d at 406.

Aside from quoting Walker without any analysis of the underlying case, the Response fails to address the serious procedural and due process issues presented by the City's 53 years after-the-fact challenge to Decision No. 33424. The circumstances here deeply prejudice Arizona Water Company in defending against the City's unsubstantiated

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allegations concerning what the Commission knew, heard, assumed, and understood at the time it issued the CC&N to Arizona Water Company. These are exactly the circumstances under which the equitable doctrine of laches should apply. The concerns raised by the Supreme Court in Walker and Pacific Greyhound about applying the doctrine of laches with respect to the issuance of those void CC&Ns are not present here.

VI. CONCLUSION.

The City's Petition and Response make it abundantly clear that the City's entire case is built upon conclusions unsupported by any factual allegations relevant to the legal burden the City must meet. It is form without substance. The City has failed to contest the 1961 CC&N for over 53 years. The City offers nothing more than conjecture and speculation, dressed up as "facts," knowing that any witnesses or documents that might controvert the City's positions will be absent or impossible to locate. From both a public policy and Arizona law perspective, the City's Petition should be dismissed with prejudice under Rule 12(b)(6) of the Arizona Rules of Civil Procedure and the Commission's Rules of Practice.

RESPECTFULLY SUBMITTED this 23rd day of February, 2015.

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By _____

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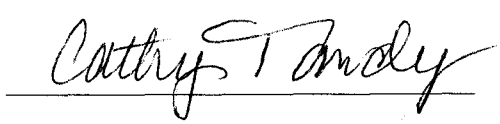

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